No. 99-476

FILED

OCT 21 1999

CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1999

VALENCE TECHNOLOGY, INC., CARL E. BERG, LEV M. DAWSON, CALVIN L. REED, DALE R. SHACKLE,

Petitioners,

vs.

JAMES I. BERRY; JAMES VARANO; GREGG M. WEISS; PETER GARUCCIO, M.D., P.C. PENSION PLAN; FREDERICK JEWETT; JILBURNE E. ESTES; JOSEPH P. YONKE; INVESTAR PARTNERSHIP; EUGENE HONEYMAN; ANNE KANTOR; MURRAY GOLDSMITH; MORTON SURKIN; FLORENCE SURKIN; ROBERT LEIMSIDER; GILBERT BERGELSON,
on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL VENTURE CAPITAL ASSOCIATION IN SUPPORT OF PETITIONERS

MICHAEL L. CHARLSON
Counsel of Record
CLYDE J. WADSWORTH
HELLER EHRMAN WHITE & McAULIFFE
525 University Avenue
Palo Alto, CA 94301-1900
(650) 324-7000

Attorneys for Amicus Curiae
NATIONAL VENTURE CAPITAL ASSOCIATION

Pursuant to Rule 37.2 of the Supreme Court Rules, Amicus Curiae National Venture Capital Association ("NVCA") hereby respectfully submits this brief in support of Petitioners' petition for writ of certiorari.[1] The parties have consented to the filing of this brief, and their written consents are submitted herewith.

INTEREST OF AMICUS CURIAE

NVCA is a national organization dedicated to defining, serving and representing the interests of the venture capital and private equity industries. Formed in 1973 to foster understanding of the importance of venture capital to the vitality of the U.S. economy, NVCA works to stimulate the flow of risk equity capital to emerging and developing companies, including through the public securities markets.

As Congress recognized with its adoption of the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[2] excessive and abusive securities litigation has become a serious burden to the national economy, making it more difficult for emerging and developing companies to raise capital, to attract experienced board members to serve on their boards of directors, to compete internationally and to offer employment opportunities to American workers. *See, e.g.*, H.R. Rep. Conf. No. 104-369, at 32-41 (1995). Moreover, the burden of excessive securities litigation falls disproportionately on relatively less established companies whose fortunes are less predictable and whose stock prices are therefore more volatile. These companies tend to be smaller in terms of market capitalization, and often include emerging technology companies and other businesses involved in innovative

---

[1] No counsel for any party had any role in authoring this brief and no person other than NVCA or its counsel made any monetary contribution to the preparation or submission of this brief.

[2] The PSLRA amends the Securities Exchange Act of 1934 (the "1934 Act"), and applies to private class actions brought pursuant to the Federal Rules of Civil Procedure. *See, e.g.*, 15 U.S.C. § 78u-4(a)(1) (1997).

or risky ventures. Many of the companies that are victims of securities litigation abuse are doing important, innovative work that is vital to the future health of the national economy and to future job creation.

As a representative of the venture capital and entrepreneurial communities, NVCA has a vital interest in the issue raised by this case: what actual or constructive knowledge of the plaintiff is legally necessary to trigger the one-year limitations period for private claims arising under Section 10(b) of the 1934 Act, codified at 15 U.S.C. § 78j(b). A uniform legal standard for triggering the limitations period is essential to curb the filing of opportunistic securities claims. This is especially true given the broad venue provisions of the 1934 Act. *See* 15 U.S.C. § 78aa. These are issues of great concern to the venture capital and private equity industries, and we respectfully submit this brief in order to address them.

REASONS FOR GRANTING THE WRIT

In their petition for writ of certiorari, Petitioners identify two conflicts that exist in the Circuits on the legal standard triggering the statute of limitations for Section 10(b) claims. *See* Pet. at 6-7. These conflicts undermine the uniform limitations period that this Court adopted in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and increase the likelihood of abusive securities litigation.

The statute of limitations for Section 10(b) claims serves important public purposes. These include finality and predictability in the legal affairs of companies, protecting potential defendants from the burden of having to respond to stale and opportunistic claims, and discouraging investors from adopting a wait-and-see approach. *See Tregenza v. Great American Comm. Co.*, 12 F.3d 717, 722 (7th Cir. 1993) (inquiry notice standard discourages tactic of "[h]eads I win, tails you lose"), *cert. denied*, 114 S. Ct. 1837 (1994); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1413 (9th Cir. 1987) (the 1934 Act is intended "to protect the innocent investor, not one who loses

his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act"). Indeed, this Court has warned against the abuse of the securities laws that comes from allowing potential plaintiffs to "await developments on the sidelines without risk." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747 (1975); *see also Basic, Inc. v. Levinson*, 485 U.S. 224, 256-57 (1988) (White, J., concurring).

These important purposes are defeated by the application of inconsistent legal standards for triggering the one-year limitations period for Section 10(b) claims. *See* Pet. at 7-10. In particular, allowing differing standards to trigger the limitations period increases the risk of opportunistic claims. As Judge Posner has stated:

> Three years is an age in the stock market. If the suspicious investor had a wide choice of times at which to sue within a three-year period rather than being required to sue no more than one year after the earliest possible date, the opportunistic use of federal securities law to protect investors against market risk would be magnified.

Tregenza, 12 F.3d at 722.

There is a particular need for national uniformity in the legal standards applicable to Section 10(b) claims because of the liberal venue provisions of the 1934 Act, *see* 15 U.S.C. § 78aa, which have been read effectively to confer nationwide venue in many investor class actions. *See, e.g., Washington Pub. Utils. Group v. United States Dist. Court*, 843 F.2d 319, 328 (9th Cir. 1988). The differing standards that inform the question of when the one-year limitations period begins to run in different Circuits, *see* Pet. at 7, raise the specter of one district court permitting a Section 10(b) claim to go forward despite the fact that the identical claim would be time-barred in another district. Such a result can only promote forum shopping and is entirely inconsistent with the uniform limitations period that this Court adopted in *Lampf*.

CONCLUSION

For all of the reasons stated herein and in Petitioners' petition for writ of certiorari, amicus respectfully urges the Court to grant that petition and permit full briefing on the merits.

DATED: October 21, 1999

Respectfully submitted,

MICHAEL L. CHARLSON
Counsel of Record
CLYDE J. WADSWORTH
HELLER EHRMAN WHITE &
McAULIFFE
525 University Avenue
Palo Alto, CA 94301-1900
(650) 324-7000

Attorneys for Amicus Curiae
NATIONAL VENTURE
CAPITAL ASSOCIATION